

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>IOWA DEPARTMENT OF JUSTICE, OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v.</p> <p>AMERICA'S TELE-NETWORK CORP. and JOHN W. LITTLE, President of America's Tele-Network Corp.,</p> <p style="text-align: center;">Respondents</p>	<p>DOCKET NO. FCU-00-6</p>
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ORDER REGARDING MOTION TO WITHDRAW

(Issued May 8, 2001)

On December 15, 2001, AT-N filed Prepared Rebuttal Testimony, a Motion to Strike, and a Motion for Leave to Depose Complainants, Issue Subpoenas and Continuance. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) resisted and filed an Application for Separate Adjudication of Law Points. The undersigned issued an order on January 4, 2001, granting a continuance, requesting information, and partially ruling on the motion to strike. In its Resistance and Answer Brief filed January 22, 2001, AT-N asserted it had not received notice of the informal complaints that form the basis for this formal

complaint case. This assertion was contrary to the evidence in the record in all but two of the informal complaint files. (See order issued February 26, 2001, pp. 16–18).

On February 26, 2001, the undersigned issued an order that, among other things, granted AT-N's request to depose the complainants with restrictions.

On March 19, 2001, Kirk Salzmänn and Jacques D. Schira, attorneys for America's Tele-Network, Corp. and John W. Little (AT-N), (the Petitioners), filed a Motion to Withdraw Appearance and Representation as Counsel. In support of the motion, the Petitioners stated they had learned AT-N's telephone and facsimile lines had been disconnected preventing direct communication, that AT-N had failed to respond to electronic messages (e-mail), and had failed to provide client authorization as well as the needed involvement in the preparation of its defense. The Petitioners further stated that on March 9, 2001, AT-N was given reasonable notice that Petitioners could be forced to withdraw their representation in this matter based on AT-N's unresponsiveness, and attached a copy of the March 9, 2001 letter they had sent to their clients along with a copy of the return receipt card. The return receipt card is unsigned by AT-N.

Petitioners stated that AT-N's "unresponsiveness, lack of attention and inability to substantially fulfill its obligations to Petitioners has made it unreasonably difficult for Petitioners to carry out the duties of their employment and justifies withdrawal pursuant to Iowa Code of Professional Responsibility DR2-110(c)(1)." They requested that the Board issue an order permitting them to withdraw from further representation of AT-N and John W. Little. Mr. Salzmänn's sworn statement

attached to the motion stated that AT-N and John W. Little "have refused to cooperate with us and have been unresponsive to counsel inquiries making it unreasonably difficult for us to carry out our duties as counsel." He further stated that reasonable notice of their intent to seek Board permission to withdraw, if cooperation could not be secured, was given to AT-N and John W. Little via certified letter dated March 9, 2001. The certificate of service attached to the Motion states it was served on AT-N by certified mail.

On March 26, 2001, the Petitioners filed a statement that stated counsel was unable to comply with the filing deadlines contained in the February 26, 2001 order because "Counsel has been unable to obtain the required information, cooperation and authorization from America's Tele-Network or John W. Little to continue its participation in this proceeding." Petitioners further stated, "Since mid-January, [AT-N's and John W. Little's] total failure to authorize courses of actions, sign documentation, forward information or otherwise indicate that it wishes to proceed with its defense appears to be final. Counsel, therefore, is faced with what appears to be [AT-N's and John W. Little's] implied decision to not actively participate, either directly or by representation, in these proceedings." Based on this situation, Petitioners stated they were unable to forward required testimony and documentation and could not comply with the February 26, 2001 order.

On April 2, 2001, the Consumer Advocate filed a Conditional Objection to Motion to Withdraw Appearance and Representation. In its conditional objection, the Consumer Advocate stated it was unable to assess the validity of counsel's claims in

the motion to withdraw. The Consumer Advocate cited to an FCC order issued March 13, 2001, and stated The Helein Law Group, P.C. represented AT-N in the FCC proceeding "and possibly in other state proceedings concerning slamming complaints." The Consumer Advocate stated that "as verification of the grounds upon which the present motion is based, Counsel should be required to provide proof that they have requested and/or obtained permission to withdraw their appearance and representation of AT-N before the FCC and all other judicial or administrative forums in which counsel has represented or is representing AT-N and/or John W. Little." The Consumer Advocate further stated, "If counsel demonstrate that they have requested and/or obtained permission to withdraw their representation of America's Tele-network Corporation and John W. Little in all other forums, OCA will withdraw its objection to counsel's motion." The Consumer Advocate attached a copy of the FCC order to its conditional objection. The FCC order states at page 13, paragraph 28 that a copy of the order shall be sent to America's Tele-Network Corp. in care of Charles H. Helein and to AT-N's Georgia address, attention: John W. Little, President.

A telephone conference call regarding the motion, statement, and conditional objection was held on Thursday, April 5, 2001. Participating in the conference call were: Mr. Kirk Salzmänn, Mr. Charles Helein, and Ms. Loubna Haddad, all of the Helein Law Group, P.C., attorneys for AT-N, and Ms. Jennifer Easler, attorney for the Consumer Advocate. Mr. Salzmänn stated that Mr. Jacques Schira, co-counsel for AT-N, had an emergency and agreed that the conference call could proceed in his

absence. Despite having been instructed to do so by the undersigned's secretary, the attorneys for AT-N made no attempt to have their client present on the conference call.

At the conference call, the attorneys for AT-N changed their position with regard to their client. Mr. Helein stated that his client was overwhelmed by the number of enforcement actions against it, was getting out of the residential long distance market, and was closing down its operations. He stated the company had no money, did not want to participate in this Iowa case, and had instructed its attorneys not to participate in this Iowa case. He stated the company had not marketed since October 2000 and would not operate in Iowa.

When asked whether he still represents AT-N before the FCC, Mr. Helein answered he had not filed a motion to withdraw his representation in the FCC case. He also stated he had represented AT-N in all states where there was some outstanding enforcement action, had settled the enforcement cases in all other states, and therefore did not need to file motions to withdraw in those states. He stated AT-N had settled the cases in the other states by agreeing not to operate in the states and refunding moneys owed to customers and changing them to new carriers. He stated in most states there are no outstanding proceedings. Mr. Helein has seen no indication that AT-N has hired other counsel. He also stated that AT-N had local counsel in Georgia, although the local counsel did not handle regulatory matters.

AT-N's attorneys provided AT-N's last known address, telephone number, fax number, and email address, and stated they believed AT-N was in the process of shutting down its offices in Georgia. They also clarified that they were relying only on subparagraph (d) of DR2-110(C)(1) to support their motion to withdraw.

Mr. Helein stated he could not participate in this action as an attorney because he had no records or information other than that already provided and his client would not cooperate to provide testimony. He stated his client had instructed him not to participate in this Iowa case, and under Virginia bar rules, he had an ethical obligation not to participate.

When asked when his client had told him not to participate in the Iowa action, Mr. Helein was vague, could not provide a specific date, and said it was prior to sending the March 9, 2001 certified letter. He stated that due to the numerous enforcement actions, it had become impossible for AT-N to do anything other than cease operating, and it was no longer possible for AT-N to pursue a defense in this case.

At the conference call, the Consumer Advocate expressed the concern that AT-N's counsel's withdrawal from representation in this case is selective and counsel continues to represent AT-N in other jurisdictions. The Consumer Advocate also stated there is nothing in the record to substantiate the statements made by counsel. Ms. Easler stated there is nothing in the record showing that AT-N has withdrawn from doing business in Iowa and nothing regarding AT-N's financial situation. She pointed out that until recently AT-N had requested the ability to conduct discovery,

and now counsel has stated that AT-N has changed its mind. She questioned whether AT-N had authorized the answer brief filed by AT-N January 22, 2001.

On April 16, 2001, the undersigned issued an Order Regarding Motion to Withdraw that stated there was nothing in the record to support any of the statements made during the telephone conference call by AT-N's attorneys other than the FCC order issued March 13, 2001 against AT-N, and the letter AT-N's attorneys wrote to AT-N on March 9, 2001. The order required AT-N's attorneys to file a statement and amend their motion to withdraw to conform to the statements made during the April 5, 2001 conference call. The order required the attorneys' statement to include a number of specific items, including the current address of their client, and a copy of the return receipt card attached to counsel's March 9, 2001 letter signed by AT-N as having received the letter. It also required evidence to support the statements made by counsel.

The order notified the parties that regardless of whether the motion to withdraw was granted, the procedural schedule and hearing date remained in effect, AT-N was bound to comply with the order, and no further continuances would be granted. The order also stated AT-N was currently in default of the requirements to re-file its answers to questions (separated prefiled testimony and brief) and file its telecommunications service provider registration by March 26, 2001. The order advised the parties of the options available under Iowa Code § 17A.12(3) (2001) and that since AT-N's counsel was properly served with notice of the hearing and counsel

represented AT-N at the time of service, AT-N was properly served with notice of the hearing.

On April 20, 2001, AT-N's counsel filed a Statement in Support of Motion to Withdraw and an Amended Motion to Withdraw. The statement essentially conformed to the statements made by AT-N's attorneys during the April 5th conference call. AT-N's attorneys asserted in the statement that they had not changed their position, and that their statements at the conference call "served only to clarify and elaborate on their position as stated in their Motion to Withdraw Appearance and Representation as Counsel." The attorneys amended their Motion to Withdraw to include Iowa Code of Professional Responsibility DR 2-110(B)(4) as well as the previously relied upon ground of DR 2-110(C)(1)(d).

Iowa Code of Professional Responsibility DR 2-110(B)(4) provides that:

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

...

(4) The lawyer is discharged by the client.

Iowa Code of Professional Responsibility DR 2-110(C)(1)(d) provides that:

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client:

...

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively.

In their statement filed April 20th, AT-N's attorneys objected to the information sought by the Board on the ground it violates the attorney-client privilege. However, they provided much of the required information in their statement. The objection that the requested information violates the attorney-client privilege is without merit. The order merely requires the attorneys to support the statements they made in the April 5, 2001 conference call.

The April 16th order required AT-N's attorneys to submit evidence in support of their statement. The attorneys submitted no evidence with the statement. They submitted no affidavit or letter of AT-N showing AT-N has discharged the Helein Law Group, and nothing to show AT-N has "made clear that they will not and have not authorized Petitioners to pursue a defense in this case."

In their statement, AT-N's attorneys asserted the record already shows a number of facts, including that "AT-N has ceased active operations and shut down its offices, terminated its employees, vacated its offices, and is in the final stages of completing the remaining steps to wind up all of its business affairs," that AT-N's customer base has eroded and its revenues have been reduced accordingly, and that AT-N earmarked funds to pay customer refunds and existing regulatory fines and penalties. There is nothing in the record other than the attorneys' statement itself to support these assertions, and AT-N's lawyers did not submit any evidence with their statement.

In their statement, AT-N's attorneys provided AT-N's last known business address, telephone number, fax number, email address, and contact person. They also stated that to the best of their knowledge, the address is no longer valid. AT-N's attorneys did not provide a current address or other contact information for their client despite having been ordered to do so.

AT-N's Iowa counsel, Mr. Schira, represents AT-N only in this proceeding. The Helein Law Group represents AT-N as its regulatory counsel in administrative proceedings in various jurisdictions. In their statement, AT-N's attorneys asserted that all of the state administrative proceedings have been settled or are in the final stages of being settled. The Helein Law Group continues to represent AT-N in an active case before the FCC. The attorneys have not filed motions to withdraw in any jurisdiction other than Iowa. When asked how Mr. Helein contacts AT-N with regard to the FCC case, the attorneys answered in their statement, "Mr. Helein has had long-standing instructions from AT-N with regard to the FCC case and, accordingly, there is no current need to contact AT-N with regard to that matter."

AT-N's attorneys provided the name, address, telephone, and fax number of AT-N's local counsel in Georgia, but stated "To the best of Petitioner's knowledge, Georgia counsel's representation of AT-N is limited to specific litigation matters involving Georgia venue and does not extend to general regulatory matters."

On May 2, 2001, the Consumer Advocate filed a Response to Amended Motion to Withdraw Appearance and Representation and Withdrawal of Objection. In its response, the Consumer Advocate stated it accepts AT-N's lawyers' assertion

that they have been discharged by AT-N, and withdrew its objection to the motion to withdraw.

Iowa Code of Professional Responsibility DR 2-110(A)(2) provides that “a lawyer shall not withdraw from employment until reasonable steps have been taken to avoid foreseeable prejudice to the rights of the client”

On March 19, 2001, attached to their original Motion to Withdraw, AT-N’s lawyers filed a copy of a letter addressed to AT-N on March 19, 2001, in which they stated that they had decided to withdraw from representation of AT-N.

They stated that they had decided to withdraw from representation of AT-N because they had been discharged by AT-N.

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Curiously, the return receipt card is not the same as that attached to the original motion. The card is addressed to "John Little", and has article number 2 489 615 023 written at the bottom of the card.

The fact that both cards were presented as the certified mail return receipt card attached to the March 9, 2001 letter, but they do not match, means there is no proof in the record that AT-N received the March 9, 2001 letter. AT-N's attorneys must explain why the two return receipt cards are not the same, and present proof that AT-N received the March 9, 2001 letter.

Ordinarily, when an attorney files a statement saying the client has discharged the attorney and instructed him or her not to defend, a motion to withdraw would be granted so long as there is sufficient proof the client was informed the attorney was withdrawing and an appearance by a new representative was filed. The new representative could be either another attorney or a corporate officer/employee of the client. The appearance must include the representative's current name and address. 199 IAC 2.2(15), 7.2(1).

Several things have occurred in this case that make it far from ordinary. First, until its attorneys filed the motion to withdraw, AT-N was vigorously defending this case. It filed responses, motions, prepared testimony, and requested to depose and subpoena the complainants in the underlying informal complaints. Second, in its Resistance and Answer Brief, AT-N made statements contrary to evidence already in the record. Third, AT-N's attorneys first asserted in their motion to withdraw that their client was unresponsive, failed to provide client authorization and needed

involvement, and that Iowa Code of Professional Responsibility DR2-110(C)(1)(d) provided grounds for withdrawal. Then, in their amended motion to withdraw, the attorneys asserted that their client was shutting down its business, had discharged the attorneys in this case only, had instructed its attorneys not to defend the Iowa case, and that Iowa Code of Professional Responsibility DR2-110(B)(4) provided grounds for withdrawal, while asserting that they had not changed their position. Fifth, AT-N's attorneys have failed to provide a current address and other contact information for their client. Sixth, the Helein Group has not filed motions to withdraw in any other jurisdiction and Mr. Helein continues to represent AT-N in an active case before the FCC while alleging he has no current need to contact his client. Seventh, AT-N's attorneys did not provide evidence to support their statement filed with the amended motion to withdraw despite having been ordered to do so. Eighth, AT-N's attorneys submitted two different certified mail return receipt cards that they asserted were attached to the March 9th letter. Finally, no appearance by a new representative (either an attorney or client corporate officer/employee) with a current address has been filed.

Therefore, the Motion to Withdraw should be denied until one of the following occurs:

- 1) AT-N's attorneys comply with the April 16th order and file evidence to support certain portions of their statement as detailed above, their client's current address, and an explanation regarding the return receipt cards discussed above with proof AT-N received the March 9th letter.

2) AT-N's new representative files an appearance that complies with 199 IAC 2.2(15) and 7.2(1). This appearance must include the name and current address of the representative. The representative may be either an attorney or a corporate officer/employee of AT-N. The appearance must be accompanied by an affidavit of AT-N that it intends to defend in this case and will comply with the procedural schedule, and by any filings for which AT-N is already in default.

3) AT-N files an affidavit stating it has discharged the Helein Law Group from representing it in this case, it does not intend to pursue a defense in this case, and it will accept the final decision of this agency in this case. This affidavit must include a current address for AT-N/John W. Little.

IT IS THEREFORE ORDERED:

1. The Motion to Withdraw is denied until one of the following occurs:

a) AT-N's attorneys comply with the April 16th order and file evidence to support certain portions of their statement as detailed above, their client's current address, and an explanation regarding the return receipt cards discussed above with proof AT-N received the March 9th letter.

b) AT-N's new representative files an appearance that complies with 199 IAC 2.2(15) and 7.2(1). This appearance must include the name and current address of the representative. The representative may be either an attorney or a corporate officer/employee of AT-N. The appearance must be accompanied by an affidavit of AT-N that it intends to defend in this case and

will comply with the procedural schedule, and by any filings for which AT-N is already in default.

c) AT-N files an affidavit stating it has discharged the Helein Law Group from representing it in this case, it does not intend to pursue a defense in this case, and it will accept the final decision of this agency in this case.

This affidavit must include a current address for AT-N/John W. Little.

2. The procedural schedule and hearing date contained in the February 26, 2001 order remain in effect.

3. The remaining ordering clauses contained in the Board order issued November 20, 2000 and the order issued February 26, 2001 remain in effect.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Acting Executive Secretary

Dated at Des Moines, Iowa, this 8th day of May, 2001.